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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GERARDO HERNANDEZ, Plaintiff, vs. TAQUERIA EL GRULLENSE; JUAN FRANCISCO GAMEZ GARCIA dba TAQUERIA EL GRULLENSE; OSCAR PANG-CHENG LIU; CHU-CHING KUO LIU; OSCAR PANG-CHENG LIU AND CHU-CHING KUO LIU, Co-Trustees for the Liu Family Trust, dated September 26, 2008; and DOES 1 through 10, Inclusive, Defendants.	Case No.: C12-03257 WHO **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS** Hearing Date: February 5, 2014 Time: 2 p.m. Place: Federal Courthouse 450 Golden Gate Ave. San Francisco, CA Judge: Hon. William H. Orrick

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I. INTRODUCTION

With the issues of damages and injunctive relief resolved in this disability access case, the plaintiff's attorneys now move for attorney fees and costs. The sum of fees and costs sought ($95,539) dwarfs the relief obtained, ($10,000 and injunctive relief, both of which were resolved without any discovery other than a site inspection). They also outstrip the resources of these defendants, who have made their plight clear to the plaintiff's counsel from the inception of settlement discussion.

If these fees were the product of extensive litigation over ground-breaking issues of social advancement, the plaintiff's attorneys would find greater support for their fee application. But the situation is much different here.

The result here is not the establishment of new rights, but the pursuit of a few improvements that better meet the needs of the disabled at a small restaurant site (some parking lot grading, and other minor accommodations, and a new bathroom that is wide enough for a wheelchair to better navigate). This result was achieved by a site inspection, routine pleadings, a mediation, and incidental procedural matters. Truly, this is the kind of routine litigation for a firm like the plaintiff's counsel that can be run mostly by a qualified paralegal, with some oversight by a moderately experienced lawyer.

No one argues with the utility and social policy behind the improvements sought in this case, even though they arguably do not meet the "readily achievable" standard that the plaintiff needs to prove.

However, the fees and costs sought in this matter are patently unreasonable. The bills supplied with the plaintiff's motion are full of duplication of efforts by several time keepers, with excessive conferencing amongst counsel, billing by administrative staff, and excessive work by high hourly rate lawyers for "cut and paste" legal work.

But, the unreasonableness of the plaintiff's fees request goes further than the overstated and duplicative work by the plaintiff's counsel. The defendants are not land barons and major corporations. They are the operator of a taqueria (Juan Gamez) and the owners of a small, single story building in Redwood City that has not been modified in over thirty years (the Liu defendants). These defendants reached deep to provide access as best as they could, rather than fight a legal battle. That commitment to the social goal of the ADA does not deserve a fee demand that is in the nature of a windfall, given the high hourly rates and excessive hours. The plaintiff's counsel should be as budget minded as everyone else in this litigation, given the circumstances here.

That message of limited resources was made clear to the plaintiff's counsel early on in this litigation, but the plaintiff's counsel insisted upon an overstated fee demand ($55,000), and a settlement tactic that left the defendants without a choice. Indeed, much of the fees generated are self-propelled by the plaintiff's attorneys' fee demands.

Reasonableness is a flexible concept that must consider the totality of the circumstances. Here, the calculus should take into account the no fault nature of the conduct involved, the circumstances of the defendants, including the nature of the defendant's business, and their limited resource, and the balancing of other social priorities, such as the plight of small business owners.

The social priority of access to the disabled is a burden that should be shared. Disability access litigation is a nightmare for small businesses. And demands such as the plaintiff's here (on average over 50 times the minimum wage) has dire consequences for small business operators. Such excessive fee demands should not be condoned for routine litigation of this nature.

II. BACKGROUND FACTS AND ALLEGATIONS

This is a disabled access case, filed under the ADA and state law, based on the alleged denial of disability access rights to plaintiff, a paraplegic wheelchair user.

The defendants are JUAN FRANCISCO GAMEZ GARCIA dba TAQUERIA EL GRULLENSE ("JUAN GAMEZ," operator of the restaurant), and OSCAR and CHU-CHING LIU (as individuals and trustees), in their capacity as trustees for the trust that holds title of the property upon which the restaurant operates, as depicted below.

TAQUERIA EL GRULLENSE

The business has been in existence since 1998, and in recent years, defendant JUAN GAMEZ clears something in the range of $40,000 to 45,000, after all is said and done. (Decl of Juan Gamez,. ¶ 6.)

The plaintiff GERARDO HERNANDEZ alleged that he twice visited the TAQUERIA EL GRULLENSE, and encountered difficulty maneuvering his wheelchair in the bathroom provided for patrons of the restaurant. Both times he used the restroom, and on his second visit, he claims to have suffered a "humiliating bodily functions accident" because of his inability to navigate the restroom. [Complaint, Case3:12-cv-03257-WHA Document1, Paragraphs 10-11]

The plaintiff never complained to the defendants about his accident. Suit was filed instead, alleging erroneously (on information and belief) that the building had been modified, and was subject to building standards in place since 1982 and following. [The complaint went on to allege that, even without a sufficient alteration history, "such premises are subject to the "readily achievable" barrier removal requirements of Title III of the Americans With Disabilities Act of 1990." (Complaint, Case3:12-cv-03257-WHA Document1, ¶ 4.)[1]

III. FACTS PERTAINING TO NEGOTIATIONS AND SETTLEMENT

This case was subject to General Order 56. However, due to financial limitations, it took JUAN GAMEZ considerable time to engage counsel. (Gamez Decl., ¶ 9)

No discovery occurred in this case, with the exception of a site inspection. Thereafter a mediation was held, under the auspices of the court's panel program. (Farbstein Decl. ¶ 4.)

Defendants settled with plaintiff by agreeing to injunctive relief pursuant to a proposed Consent Decree and Order (not to exceed $25,000), and $10,000 damages, which damages have been paid. (Gamez Decl. ¶ 8)

Contrary to the erroneous statement of Mr. Rein's declaration, defendant JUAN GAMEZ produced the tax return and financial statement of the business for inspection by the plaintiff's counsel, as part of the "readily achievable" discussion.[2] (Farbstein Decl. ¶ 6.) Throughout the settlement dialogue, the defendants' financial statuses were discussed, both as part of the discussion of the "readily achievable" standard, and because the defendants' ability to respond to the litigation was severely compromised by the limitations on financial resources. (Farbstein Decl. ¶ 7.)

The plaintiff's attorneys' settlement tactic turned out to be a trap. They refused to discuss attorneys fees until the damages and injunctive relief were resolved, claiming a conflict of interest. The defendants' counsel explicitly warned the plaintiff's counsel that there were limited funds, and that if they insisted on this tactic then they need to bear that in mind going forward. Yet, after the damages and injunctive relief were negotiated, the plaintiff's counsel demanded $55,000 in attorneys fees and costs, dwarfing the other elements of the settlement, and leaving the defendants with no alternative but to defend against a motion.[3] (Farbstein Decl. ¶ 8.)

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[1] In his declaration, Paul Rein accuses the defendants of failing to cooperate for not producing records of building improvements. But, there were no such records to produce, at least in the possession of the defendants. The building has been largely untouched since its original incarnation as an A&W Root Beer location. [See Decl of Oscar Liu].

[2] The plaintiff's motion for fees describes the defendants' settlement positions, violating rules of mediation confidentiality. The conundrum for defendants is that the moving papers incompletely and sometimes inaccurately describe the defendants' communications at mediation and otherwise, necessitating a response that includes positions taken at mediation. [See USDC ADR Local Rule 6-12]

[3] This is not a refusal to negotiate, as the plaintiff's attorneys characterize it. The distress and dismay of the defendants over the plaintiff's attorneys' ruinous fees demands are the product of being in an impossible financial situation; they cannot afford to litigate what is, in actuality a weak ADA case, and they cannot afford to settle the case anywhere close to the range demanded by the plaintiff and his lawyers.

IV. LEGAL STANDARD

The calculation of a reasonable fee award involves a two-step process. *Fisher v. SJB-P.D., Inc.*, 214 F. 3d 1115, 1119 (9th Cir. 2000). First, the court calculates the presumptive fee award, also known as the " lodestar figure" by taking the number of hours reasonably expended on the litigation and multiplying it by a reasonable hourly rate. ld. (citing *Hensley v. Eckerhart*, 461 U.S. 424. 433 (1983)). Second, in "appropriate cases" the Court may enhance or reduce the lodestar figure based on an evaluation of the factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69- 70 (9th Cir.1975) that were not taken into account in the initial lodestar calculation. *Intel Corp. v. Terabyte Intern, Inc.* 6 F.3d 614, 622 (9th Cir. 1993). [4]

Regarding determination of the lodestar figure, the fee applicant bears the initial burden of substantiating the hours worked and the rate claimed. *Strange v. Monogram Credit Card Bank of Georgia* (7th Cir. 1997) 129 F.3d 943, 945. To establish the hours worked by each attorney at a firm, as required under the lodestar method for calculating attorney fee awards, the fee applicant must provide a fully detailed itemization of the date, hours and nature of the work performed. *Miller v. Woodharbor Molding & Millworks, Inc.* (1999) 174 F.3d 948, 949. The court may reduce the plaintiff's fee award where the documentation of hours is inadequate. *Hensley*, *supra*, 461 U.S. at 433. A plaintiff is not entitled to recover fees for time spent performing administrative tasks simply because a professional performs the tasks. *Missouri v. Jenkins* (1989) 491 U.S. 274, 288.

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[4] The plaintiff's opening brief disclaims any entitlement to an increase in the lodestar figure.

As for the enhancement or reduction of the lodestar amount, factors specified in *Kerr* include: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (II) the nature and length of the professional relationship with the client; and (12) awards in similar cases. (*Kerr*, 526 F.2d at 70). Admittedly, there is a "strong presumption" that the lodestar figure represents a reasonable fee and that adjustment upward or downward is "the exception rather than the rule." *Emanuele v Montgomery Ward & Co.*, 904 F.2d 1379, 1384 (9th Cir. 1990).

V. ARGUMENT: PLAINTIFF'S REQUESTED FEES ARE EXCESSIVE AND UNREASONABLE

Plaintiff is not entitled to fees simply because his counsel spent time litigating. Assuming that Plaintiff is entitled to some amount of attorneys fees, Plaintiff is only entitled to reasonable fees for hours *reasonably* spent litigating plaintiff's claims as a *reasonable* hourly rate. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d at 978. Counsel should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary. *Henseley* 461 U.S. at 434. "Padding in the form of inefficient or duplicative efforts is not subject to compensation….Where appropriate, the court has discretion to adjust the lodestar downward or deny fees altogether." *Ketchum v. Moses*, (2001) 24 C4th 1122, at 1132.

The amount requested for attorney's fees should also be reduced if the work performed by a senior attorney could have been done by someone more junior. *See, e.g., Signature Flight Support v. Landow Avn. Ltd. Part.*, 730 F. Supp. 2d 513, 522 (E.D. Ca. 2010). A "claim by a lawyer for maximum rates for telephone calls with a client, legal research, a letter concerning a discovery request, the drafting of a brief" and similar tasks that could have been performed by a more junior attorney or a paralegal "is neither fair nor reasonable." *Loughner v. University of Pittsburgh*, 260 F.3d 173, 180 (3d Cir. 2001).

Here, Plaintiff's counsel consists of a team of a total of three attorneys and two paralegals. Plaintiff failed to proffer any justification as to why it was necessary to have two partner-level attorneys litigate this case.

A. PLAINTIFF'S HOURS EXPENDED ARE UNREASONABLE

1. Overstaffing and Duplicate Attendance at Mediation

Attorney	Hourly Rate	Description	No. of Hours	Amount Charged	Comment
Paul Rein	$645	Mediation	11.5	***$7417.50***	Duplication
Cat Cabalo	$425	Mediation	11.5	$4887.50	

There was no need for Paul L. Rein, claiming a rate of $645.00/hour, to attend the mediation. As Ms. Cabalo states in her declaration and in the body of their points and authorities, she has been practicing in this area of law exclusively for at least 4 years, and has 12 years of litigation experience. (See Dkt. No. 74, ¶3.) Nor do the facts or law of this case present any novel issues which require Mr. Rein's presence, other than to drive up the cost of litigation. This case is virtually identical to the five others filed by this plaintiff, using this law firm.[5]

Ms. Cabalo was familiar with the facts of the case; if she needed supervision (which she should not, given her claimed experience), that is not Defendants' responsibility. Rein's self-serving declaration that he was lead counsel merely in handling the "attorney fees aspects of this case" makes no sense, and demonstrates that he is driving up the bills unnecessarily. With detailed timesheets and invoices purporting to be accurate representations of the fees involved, Defendants are confident Ms. Cabalo was capable of handling the attorney fees aspects herself, rather than incurring an additional $7,417.50 for Mr. Rein's attendance at the mediation. If not, then her hourly rate is entirely unjustified.

2. Rote Work Done at High Billing Rates; Overstated Hours and Clerical Work Billed as Part of Fee Motion

The "cut and paste" nature of the legal services provided in this case cannot be overstated. The complaint in this case mirrors the same in the other Hernandez cases, but for a few facts. (see fn. 5). Moreover, these same issues are raised time and time again, in case after case. According to PACER records for the Northern District, since 2006, Paul Rein is listed as attorney on 127 ADA (446) cases. Celia McGuiness has worked on 96 of those cases with him (including all of the Hernandez cases). Catherine Cabalo has worked with him on 72 ADA 446 cases (including all of the Hernandez cases.)

[5] The case numbers for all six cases by Hernandez represented by the Rein firm: 3:12-cv-01467-NC, 3:12-cv-02080-

The initial steps are routine: 1) get the rudimentary facts from the client (which can't take more than an hour) 2) assess the property's compliance, by site inspection and review of building records, 3) identify the parties, 4) file the complaint (which is already virtually done), and 5) mediate the case (using briefs and forms that are already written , but for the individual factual variations). This kind of work is suitable for a knowledgeable paralegal (as Mr. Aaron Clefton purports to be), with modest oversight by an attorney.[6]

It is noteworthy that up to and including the mediation, Mr. Rein claims to have spent 40.9 hours on the case. He has since billed 25.8 hours on the case, including a whopping 13.4 hours on this motion for fees. How 5.7 hours on the memorandum of points and authorities, 2.3 hours drafting his declaration, and 5.4 hours researching, editing, and putting together exhibits were a "reasonable" expenditure of his time is unfathomable, given his extremely high hourly rate, the cut-and-paste nature of the motion, and two office staff. He has cited no new law, except for an order issued in a case his office litigated last year - which he did not have to look hard to find.

Plaintiff seeks an award of $8,908.00 for the preparation of this instant fee application which is almost a verbatim replica ("cut and paste") of the substance of prior fee applications.

	Hourly Rate	Description	No. of Hours	Amount Charged	Comment
Paul Rein	$645	Fee Motion	13.4	***$8643.00***	Paralegal

JSW, 3:12-cv-03257-WHO (this case), 3:13-cv-02445-EDL, 3:13-cv-03537-LB and 5:13-cv-05956-LHK

[6] The plaintiff's attorneys want it both ways: a high billable rate reflecting their experience, and many hours of labor, which is only justified if novel work is required.

		Work (excl. conferencing)			work by high-rate billers
Cat Cabalo	$425	Fee Motion Work (excl. conferencing)	2.6	$1105.00	
Celia McGuinness	$495	Fee Motion Work (excl. conferencing)	1.0	$495.00	
Aaron Clefton	$175	Fee Motion Work	0.8	$140.00	

A review of the billing statements for each of the attorneys reveals that that Paul Rein billed 11.90 hours for the preparation of this instant application and that Catherine Cabalo billed the amount of 2.90 hours. The total amount of time and fees allocated to the preparation of this motion for a fee award is $8,908.00.

The fee is excessive in light of the fact that other than 2 pages of the Memorandum of Points and Authorities devoted to the statement of the facts in this particular case, the remainder substantive portions of the brief right down to the charts on page 27 and 28 (referencing electronic page identification) are identical verbatim “recycled” portions of briefs that the Rein firm has already received compensation for in prior cases. The memorandum of points and authorities which is most “word for word” is in the case of *Cruz v. Starbucks Corp.*, Case3:10-cv-01868-JCS. The memorandum of points and authorities is Document72 of that case, filed on 03/29/13.

Another version of the memorandum of points and authorities is found in *Delson v. CYCT Mgmt. Grp., Inc.*, Case3:11-cv-03781-MEJ Document23 Filed11/02/12, in which case the Rein firm has also received an attorneys fees award for.

The Court only needs to review the Table of Contents and Table of Authorities for the Memorandum of Points and Authorities for both this case and the *Cruz v. Starbucks* case to verify this fact. (Tsai Decl., ¶9, Exh. H)

Accordingly the excessive fees demanded for recycling briefs filed in prior cases which plaintiff's counsel already received compensation for should be reduced drastically.

Generally speaking as to this litigation, but as to this fee motion in particular, Plaintiff cannot claim that appropriate associate or paralegal staffing was unavailable. Aaron Clefton asserts that he has several years of experience as a paralegal, including eight years as the senior paralegal with Plaintiff's counsel's firm. (See Dkt. No. 76 at ¶¶ 2-3.) Mr. Clefton also asserts that for the past nine years, he has "specialized" in "legal research, fact gathering, client interviewing, and briefing for cases involving disabled plaintiffs." (See Dkt. No. 76 at ¶3.) Thus, there is no justification for the attorneys' extensive billing in this matter when a senior paralegal, who bills at a rate less than a third of Mr. Rein's rate, is clearly capable of handling much of that work. Plaintiff's fee request should be reduced accordingly.

Additionally, the nature of Ms. Jaramillo's work was administrative, not legal in nature. She has not provided any external support as to the reasonableness of her billed rate of $135.00, other than her own affirmation. Her hours must therefore be deducted.

3. Excessive Conferencing

Attorney	Hourly Rate	Description	No. of Hours	Amount Charged	%age of Total Hours

Paul Rein	$645	Conferencing	18.7	***$12061.50***	***28.04%***
Cat Cabalo	$425	Conferencing	4.9	$2082.50	7.78%
Celia McGuinness	$495	Conferencing/ supervision	0.9	$445.50	7.44%

Paul L. Rein, the senior attorney claiming a billing rate of $645.00 per hour, spent 18.7 of his 66.7 hours (28.04%) in “conferences” with his co-counsel and staff members. 7.3 of these hours were post-mediation, and not resulting in any material gain to his client. In particular, Mr. Rein’s expenditure of time on conferencing is unreasonable given his and his colleagues’ claimed level of expertise. For a case such as this, which presents no novel legal or factual issues, 18.7 hours of conferencing is both extreme and unreasonable. Defendants request that it be lowered to 5% of billed time, or approximately 3.3 hours, as they object to paying for fees associated with Mr. Rein’s supervisorial role, and it is not reasonable to shift to defendants the costs of supervising and/or training junior counsel or staff.

4. Excessive Duplication for Document Review

Attorney	Hourly Rate	Description	No. of Hours	Amount Charged	Comment
Paul Rein	$645	Receipt/review of documents	4.3	***$2773.50***	Duplication
Cat Cabalo	$425	Receipt/review of documents	4.9	$2082.50	
Celia McGuinness	$495	Receipt/Review of documents	0.8	$396.00	

This is another form of duplication of efforts. The only reason to justify cross checking of this magnitude would be if the attorneys involved did not have suitable expertise. Clearly that's not the case here, unless the resumes are misstated in the plaintiff's motion.

Mr. Rein is charging 4.3 hours to the receipt/review of documents. Most of these documents were notices from the court or short pieces of correspondence that were also sent to his co-counsel. Again, the overstaffing on this case has led to duplicative efforts by multiple timekeepers, and is not a reasonable request for attorney's fees.

5. Billing for Three Pre-Litigation Site Inspections is Excessive and Unnecessary.

Prior to the filing of the Complaint in this matter, Paul Rein made three site-inspections incurring $4644.00 (each roughly 2.5 hours) in attorneys fees. All three site inspections were made prior to contacting an access consultant. It is inexplicable why Paul Rein would need to go to the property three times personally to "investigate" the property prior to litigation. One site visit is reasonable. Therefore the Court should only award fees for one site visit of $1,612.50.

6. Plaintiff's Counsel's Research Fees Should Be Denied for Lack of Due Diligence.

Plaintiff's time records show that Aaron Clefton, a senior paralegal, spent over 3.4 hours ($595.00) to research the identity of the owners of the subject property, including reviewing the assessor's records received by mail. Paul Rein spent another .5 hours of his time reviewing and strategizing Clefton's research information ($322.50). In total the Rein law firm spent $917.50 on researching the correct identity of the owners of the subject property.

Plaintiff's counsel's letter of September 10, 2012 regarding his reliance on "public records" reveals the lack of diligence on Mr. Clefton's part. (Case No.3:12-cv-03257-WHO Dkt. 73-15 Filed12/20/13). First of all, there are no "assessor's records" attached as referenced in Mr. Clefton's billing. Instead, all that Plaintiff's counsel relied upon was a "screen shot" of assessor information[7], and some Westlaw printouts. Secondly, as anyone familiar with Lexis and/or Westlaw knows, the database results only reveal abbreviations of the identity of property owners, limiting the text to "a maximum field."

Defendants' motion to dismiss filed on September 5, 2012 reveals, plaintiff's counsel did not name the correct ownership entity. (Motion to Dismiss, Docket Number 13). Therefore, the time billed for relying on researching the ownership entity should be stricken.

Plaintiff's reliance on westlaw and online screenshots should be denied.

B. PLAINTIFF'S EXPERT FEES ARE EXCESSIVE - TRIPLE WHAT THEY SHOULD BE

Plaintiff's counsel seeks a total award of costs in the sum of $14,433.00, of which $12,110.00 is for access consultant Jonathan Adler's fees. A review of what Plaintiff's counsel has spent in access consultant fees in other cases reveals the grossly overinflated request for $12,100.00 for access consultant fees.

Fed Dist. Case No. (NDCA)	Case Name	Access Consultant Used by Law Office of Paul L. Rein	Amount Paid	Reference
10-01868	Cruz v. Starbucks Corporation	Margen & Associates	$3,313.05	Tsai Decl., Exh B
11-03781	Delson v. CYCT Management Group	Margen & Associates	$5,999.90	Tsai Decl., Exh. C
12-01072	Moralez v. Whole Foods Market Inc	Barry Atwood & Associates	$3,698.70	Tsai Decl., Exh. D
12-01467	Hernandez v. Dehoff Enterprises Inc	Jonathan Adler	$5,401.00	Tsai Decl., Exh. E

[7] San Mateo County Assessor's online records do not reveal the full name of the owners.

Most illustrative is what Jonathan Adler charged in another case involving Mr. Hernandez, *Hernandez v. Dehoff Enterprises, Inc.*, Northern District Court Case No., 3:12-cv-01467-NC (Filed June 14, 2013). The *Dehoff* case involved the same fact scenario, plaintiff "suffered an embarrassing bodily functions accident" due to Key Supermarket's failure to provide an "accessible" bathroom. As the Court can see from a review of Jonathan Adler's report in the *Dehoff* case, which report was attached to the Consent Decree and Order, filed on December 16, 2012, (Dkt. No. 19) the report is substantially the same in format, length of pages and information provided. Specifically, the report contains three parts, a spreadsheet identifying the violations, photographs of the premises, and proposed schematics for remediation. In that case, Jonathan Adler's charges were $5,401.00. (Tsai Decl. ¶ 6, Exh. E) In this case, as demonstrated in Exhibit 4 to the Declaration of Paul L. Rein, Plaintiff seeks the sum of $12,110.00 for an identical form of report.

On March 6, 2013, defense counsel had obtained a proposal from an AIA certified Architect, John Ha, to perform all designs, construction documents, and obtain the necessary permits from Redwood City to bring the subject property to ADA compliant. For a project of that scope, Mr. Ha's fees totals $5,600.00. (Tsai Decl., ¶ 7, Exh. F). In another case, *Holbrook v*. Lynn Tu, et al., Northern District Court Case No., 5:10-cv-03070-HRL (Filed July 13, 2010), Mr. Ha charged the sum of $2,300.00 for the General Order 56 on-site inspection, to provide schematic designs, and all other ADA construction documents. (Tsai Decl., ¶ 8 Exh. G)

Susan McDonnell of Susan McDonnell & Associates is a certified interior designer with over 30 years of experience in in designing restaurants, fast food chains and supermarkets. (McDonnell Decl., ¶ 1) Ms. McDonnell's design services includes ensuring that all projects are ADA compliant to current regulations. Therefore, as part of services, she conducts a site review, photo documentation, and ADA compliance/remedial schematics. (McDonnell Decl., ¶ 2). As a certified interior designer, Ms. McDonnell is required to maintain a high level of knowledge and professionalism on all accessibility issues for commercial properties. (McDonnell Decl., ¶ 1). After review of Mr. Adler's report, Ms. McDonnell concluded that Mr. Adler's report was redundant in that the same information was repeated in three different formats. (McDonnell Decl., ¶¶ 3, 4). The cost for her to prepare a similar ADA compliance report inclusive of a site review, photo documentation and ADA compliance/remedial schematic for the Taqueria El Grullense would be an amount ranging from $4,000.00 to $6,000.00. (McDonnell Decl., ¶ 5).

A district court discretion to deny costs where the prevailing party's taxable expenditures are unnecessary or "unreasonably large." *Andretti v. Borla Performance Indus., Inc.* (6th Cir. 2005) 426 F3d 824, 836, and cases cited therein. Trial courts may properly reduce awardable costs when "the prevailing party's taxable costs are unnecessary or unreasonably large." *White & White, Inc. v. American Hosp. Supply Corp.* (6th Cir. 1986) 786 F2d 728, 730; *In re Butcher* (CD CA 1996) 200 BR 675, 68.

In this case, Jonathan Adler's excessive fees should be reduced to $3,000.00 to $4,000.00 in line with the fair market rate for access consultant fees.

C. PLAINTIFF SHOULD NOT BE AWARDED COSTS.

1. Plaintiff has Failed to Comply with Federal procedural Requirements to Recover Costs.

Federal procedural rules apply to requests for costs in matter pending in Federal Court. See *Cates v. Sears, Roebuck & Co.*, (5th Cir. 1991) 928 F. 2d 670, 688-89. Pursuant to Local Rule 54-1, costs may be awarded by this Court only pursuant to a Bill of Costs prepared and filed with the Court. Plaintiff's counsel has failed to do so. In failing to file a Bill of Costs, Plaintiff's costs should be denied in its entirety.

2. Plaintiff's Costs are Unreasonable.

Plaintiff has also submitted requests for the reimbursement of miscellaneous n costs, including parking, meals, FedEx charges for sending documents to this court, filing fees and charges for service of process. Plaintiff's request for copying costs and legal research costs should be denied because they are inadequately documented. Though the Clefton declaration states that in-house copying costs of $2251.00 were incurred in this action and that legal research costs were incurred in the amount of $246.79, see Clefton Decl. ¶¶ 17 - 18, there is no information as to the number of pages, or an explanation of why approximately 4000-9000 pages of copying[8] was needed in this relatively straightforward case. Nor should Defendants be charged to send documents to the court via Federal Express, when electronic filing is adequate and Plaintiff has not detailed the need for such charges.

Nor is there a breakdown of the amount of time devoted to legal research or breakdown of the tasks that required legal research. It is impossible to "determine whether the requested copying and legal research costs are either allowable or reasonable," as the court stated in the fee award order in *Cruz v. Starbucks Corporation, et al.*, 2013 WL 2447862.

Plaintiff also has not cited authority indicating that his various miscellaneous expenses, which include but not are not limited to local travel, are allowable. Such expenses should therefore not be charged to Defendants. *Id.*

[8] Mr. Rein's Declaration, ¶ 32, references a copying costs estimate of $1063.00. The pages figure is an estimate based on the charges per page given.

VI. ADDITIONAL FACTORS SUPPORTING A REDUCTION IN THE "LODESTAR" AMOUNT

In "appropriate cases," the court may reduce the lodestar figure based on the an evaluation of the factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70, quoted above. This is an appropriate case for a reduction.

A denial of fees is justified in light of the limited results achieved. On March 20, 2013, Defendants reached a settlement with Plaintiff to pay him the sum of $10,000.00. In addition, the parties agreed that any remedial work to be performed on the property would not exceed $25,000.00. (Consent Decree and Order, Dkt. No.70) The parties agreed to a nominal settlement with Plaintiff HERNANDEZ and to place a cap on the remedial work because of the expressed financial limitations of both the operator defendant GAMEZ and the owner defendant LIU. Notably, Plaintiff's counsel refused to settle the amount of attorneys fees and costs at mediation, stating that this would be "left for further discussion."

Plaintiff's counsel now argues that they prevailed in a "significant achievement" for Plaintiff HERNANDEZ using the $4,000.00 minimum *per* violation Cal. Civ. Code Section 52 standard. Jonathan Adler, Plaintiff's access consultant in his report claimed no less than **48** violations, which under Cal. Civ. Code Section 52, subjected Defendants to statutory fines of $192,000.00.

Additionally, Plaintiff's Initial Disclosures (Tsai Decl., ¶2, Exh. A) reveal though that the $10,000.00 is 1/8 of Plaintiff's analysis of damages of $80,000.00. As the complaint alleges treble statutory damages, Plaintiff was essentially seeking $240,000.00 and settled for the nominal. In short, Plaintiff counsel's argument of a "significant achievement" is nothing more than an attempt to justify its request for an exorbitant $90,000.00 in fees.

Plaintiff's counsel further argues that the Answer contested liability, and therefore $90,000.00 in attorneys fees were incurred. The Court can take judicial notice of its own records that Defendants did not file a single motion in this case contesting the substantive nature of Plaintiff's claim, which was merely a "readily achievable" claim.

Plaintiff's counsel now seeks this court to award them $90,000.00 in attorneys fees, ***9 times*** the $10,000.00 in damages that the truly injured party, GAMEZ accepted. A request for $90,000.00 for counsel's own fees when GAMEZ accepted damages of $10,000.00 is not only unreasonable, it's unconscionable and should not be awarded. While being reasonable and sympathetic to Defendants' financial situation at mediation to arrive at an amount to compensate GAMEZ, Plaintiff's counsel is now demanding unreasonable fees and costs when it comes to lining their own pockets. As the United States Supreme Court has stated in *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983), the "most critical factor" in determining if fees should be awarded is the degree of good faith effort to exclude from the fee request hours that are excessive, redundant, or otherwise unnecessary." This fee motion evidences that Plaintiffs' counsel primary motivation is not, as they profess to vindicate matter of important social policy or even to enforce "full and access rights" for the disabled party.

In *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010), the Plaintiff sought $870,935.50 in attorneys' fees despite only achieving $11,500.00 in compensatory damages. *Ibid* at 976,985. The California Supreme Court held that a trial court can deny an application for attorneys' fees altogether if the "fee request…appears unreasonably inflated…in light of "the plaintiff's limited success, the amount of damages awarded, *and* the amount of time an attorney might reasonably expect to spend litigating such a claim. *Ibid*, at 990-91. The Supreme Court thus upheld the trial court's outright denial of the plaintiff's request for attorneys' fees. *Ibid*, at 991.

This is precisely the inquiry that warrants denial of Plaintiff's application. Plaintiff's counsel refused to discuss, negotiate and settle the issue of attorneys fees at mediation when defense Counsel had spent the majority of the day revealing its limited financial resources and the parties were engaged in reasonable discussions. Instead, Plaintiff's counsel continued to "churn" this case solely for the purpose of racking up another $40,000.00 plus in attorneys fees. The post mediation fees of some $40,000.00 is completely unnecessary and unrelated to the prosecution of Plaintiff's claims. When the limited "success" of $10,000.00 is considered in relation to the amount of attorneys fees Plaintiff counsel now seeks, it is clear that they only tabled the discussion so that they can seek an award that would amount to an unjustified windfall.

As noted above, this case does not present any novel or difficult questions; it's a cookie cutter repeat of dozens of other cases. Nor has the plaintiff's motion demonstrated the preclusion of other work, or other factors showing a significant sacrifice or risk to prosecute this case. This is simply a routine case, that is typical of the hundreds of this genre.

Certainly, the amount involved in the settlement and the results obtained are relatively minor, and represent the cooperation of the defendants working towards improving the property. Contrary to the characterization in the opening brief, there is scarce evidence other than pro forma pleading that the defendants litigated the case in earnest, rather than reaching a cooperative result.

But what must be taken into consideration is that the context of this lawsuit: small business defendants, with limited resources, who cooperated in the resolution, and now face financial ruin.

The defendants pleaded with the plaintiff's counsel to work cooperatively and within the budget demonstrated by the defendants. But, the response was an inordinate fee demand, which continues to trap the defendants in litigation that should not unjustly enrich the plaintiff's counsel.

VII. CONCLUSION

Cases of this nature put small businesses like these defendants in an impossible situation. The "readily achievable" standard is a fluid concept, for which summary judgment is highly unlikely. The costs of defending a case such as these are astronomic, including experts and days of trial. If lost, the plaintiff's fee petition would be in the range of $400,000 (as threatened by the plaintiff's attorneys in this case.]

The defendants took the practical approach, and the only one they could afford. The public has been served by the outcome, and the plaintiff's attorney should get a fair fee, considering all of the factors. The amount requested in the opening brief does not serve the public interest, and does not represent a fair fee considering all of the circumstances.

DATED: November 14, 2013

FARBSTEIN & BLACKMAN
A Professional Corporation

By_____/S/___________________________________

Michael A. Farbstein (Cal. SBN 107030)
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DATED: November 14, 2013

LAW OFFICE OF JUDY TSAI

By_____/S/___________________________________

Judy Tsai

Attorneys for Defendants OSCAR PANG-CHENG LIU; CHU-CHING KUO LIU; and OSCAR PANG-CHENG LIU and CHU-CHING KUO LIU as Co-Trustees for the Liu Family Trust, dated September 26, 2008